IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19/01/2004

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.1957 of 1991

1. Thasi Naidu
2. Velliah Naidu
3. Angammal
4. Perumal
5. Nagarajan
6. Selvaraj .. Appellants

-Vs-

1. R.Vasantha
2. Nagammal
3. Minor Lakshmi rep.
by her mother and
guardian the 2nd
respondents herein .. Respondents

Second Appeal is preferred u/s. 100 C.P.C. praying for the relief as stated therein.

For Appellants : Mr.B.S.Gnanadesikan

For Respondents : Ms.R.Poornima
for Mr.V.Raghavachari

:J U D G M E N T

This Second Appeal is directed against the judgment and decree dated 30.8.1991 rendered in A.S.No.101 of 1991 by the Court of District Judge, Dindigul, thereby confirming the judgment and decree dated 9.2.1990 made in O.S.No.751 of 1984 by the Court of Additional District Munsif, Dindigul.

2. Tracing the history of the above second appeal coming to be preferred, what comes to be known is that the appellants are defendants 1, 2 and 6 to 9 in the suit filed by the first respondent/plaintiff for a declaration that the suit properties belong to the plaintiff and also for possession, further claiming damages on averments such as that the suit

properties and the land measuring 24 cents on the northern side of the suit properties originally belonged to one Marayammal W/o Karuppa Naicker purchased under a sale deed dated 7.1.1902 and she was in possession and enjoyment of the same till her lifetime; that Karuppa Naicker had four brothers and the defendants are the legal heirs of Perumal Naicker, who is the last brother of Karuppa Naicker; that Munusamy is the son of Karuppa Naicker and Bangarammal is the wife of Munusamy Naidu; that Marayyan, Ramadass and Gopalakrishnan are the legal heirs of Munisamy Naidu and they were enjoying the suit properties and 24 cents of land on the northern side of the suit properties for the past 25 years having got the same by an oral partition and the same was managed by Rangasamy who is the husband of the third defendant; that on 17.5.1974, a panchayat was held in respect of handing over possession of the suit properties by Rangasamy and as per the decision of the panchayat, after executing a sale deed in respect of 21 cents of land in his favour, Rangasamy had handed over possession of the suit properties in favour of Marayan Vagaiyara; that by a sale deed dated 14.3.1984, the said Marayan Vagaiyara sold the suit properties in favour of the plaintiff for a sum of Rs.l2,100/- and ever since, the plaintiff is in possession and enjoyment of the suit properties by paying kist; that the defendants sent a notice dated 29 .3.1984 contending that the suit properties, besides the other properties, belonged to Karuppa Naicker and his brothers and that the suit properties were allotted to the share of Perumal Naicker in a partition and after the death of Perumal Naicker, the defendants, as legal heirs of Perumal Naicker, have become entitled to the suit properties and that the plaintiff is not entitled to the suit properties; that the plaintiff sent a reply dated 6.4.1984. On such averments, the plaintiff has come forward to file the above suit praying for the relief extracted supra.

3. After filing the suit, the plaintiff, alleging that the defendants trespassed into the suit properties and cultivated groundnut to an extent of 30 cents by watering from the well belonging to them which is on the northern side of the suit properties which would yield 4 bags, claims Rs.400/- as temporary damages and also claims permanent damages @ Rs.100/- per year till handing over possession of the suit properties to the plaintiff.

4. In the written statement filed by the 6th defendant which was adopted by the defendants 1,2,7 and 8, the defendants, besides generally denying the allegations contained in the plaint, would submit that the suit properties and other properties originally belonged to one Perumal Naidu and his brothers Karuppa Naicker and Mutha Naicker; that Karuppa Naicker was managing the joint family properties as 'kartha' of the joint family; that at that time, for the benefit of the joint family, he purchased some properties in the names of himself and his wife Marayammal and the suit properties were purchased in the name of Marayammal as benami for the benefit of the joint family; that the suit properties have been enjoyed by the joint family as joint family properties and Marayammal, neither individually nor as a joint family member, enjoyed the suit properties and she had no means to purchase the suit properties; that in the oral partition of the joint family properties between the three brothers, two houses at Dindigul and one garden at Thamaraikulam were allotted to Karuppa Naicker, while the lands at Palayam Village in patta Nos.633 and 625 were allotted to Perumal Naicker and Mutha

Naicker; that Perumal Naicker and Mutha Naicker were enjoying the suit properties by paying kist; that since Mutha Naicker died issueless, Perumal Naicker alone was enjoying the suit properties and Perumal Naicker died leaving behind the first defendant, Sakkarai Naidu, the 2nd defendant, viz. Vellai Naidu and Rangasamy Naidu as his legal heirs; that Sakkarai Naidu died leaving behind his wife Angammal-6th defendant and his sons-defendants 7 to 9 as his legal heirs; that the defendants are in possession and enjoyment of the suit properties by paying kist; that neither the plaintiff nor his brothers were ever in possession and enjoyment of the suit properties; that even assuming that the plaintiff and his brothers are entitled to the suit properties, the same is vitiated since the defendants and their predecessors-in-title have perfected their title by adverse possession over the suit properties; that the alleged sale of the suit properties in favour of the plaintiff by her brothers is not true and is not valid in law and that it has not created any right in the plaintiff over the suit properties; that the alleged Muchalika said to have been executed by Rangasamy Naidu is not true since Rangasamy Naidu did not execute any such Muchalika; that the alleged release deed is not true and it is not binding on the defendants; that neither the plaintiff nor her brothers were ever in possession and enjoyment of the suit properties and these defendants obstructed the same; that the defendants alone were in possession and enjoyment of the suit properties by cultivating the same. On such grounds the defendants would ultimately pray to dismiss the suit with costs. Defendants 3 to 5 and 9 remained exparte.

5. The trial Court, based on these pleadings, would frame 5 issues for determination of all the questions which are involved in the suit and would allow the parties to record their evidence, both oral and documentary, during the course of which, on the part of the plaintiff, she would examine 3 witnesses as P.Ws.1 to 3 for oral evidence, besides marking 22 documents as Exs. A.1 to A.22 for documentary evidence. Ex.A.1 dated 7.1.1902 is the sale deed executed by Mara Naicker and Ranga Naicker in favour of Marammal; Ex.A.2 dated 14.3.1984 is the sale deed executed by Maraiyan and others in favour of the plaintiff; Ex.A.3 dated 17.5.1984 is the sale deed executed by Maraiyan in favour of Rangasamy; Ex.A.4 is the patta in favour of Ramadass Naidu, Maraiyan and Gopalakrishnan; Exs.A.5 to A.11 are the copies of adangal in respect of Palayam Village for the faslis 1384, 1385, 1386, 1388, 1389, 1390, 1391; Ex.A.12 is the copy of chitta issued in favour of Ramadass and Maraiyan at the time of settlement Jamabandi; Exs.A.13 to A.17 are the kist receipts for the faslis 1393, 1394, 1395, 1397, and 1398; Ex.A.18 dated 29.3.1984 is the lawyer's notice issued by Thasi Naidu and others to Maraiyan and others; Ex.A.19 dated 6.4.1984 is the reply sent by Maraiyan and others; Ex.A.20 dated 14.5.1984 is the original patta executed in favour of the plaintiff and Rangasamy Naidu for fasli 1393; Ex.A.21 dated 17.5.1974 is the conditional release deed executed by Rangasamy Naidu in favour of Maraiyan, Ramadass and Gopalakrishnan and Ex.A.22, dated 31.8.1923 is the sale deed executed by Abdulrazak Sahib in favour of Karuppanna Naidu.

6. Likewise, on the part of the defendants also, they would not only examine the 6th defendant as D.W.1, but would also examine one more witness viz., Bomma Naicker as D.W.2 on their side for oral evidence and they would also mark 17 documents for documentary evidence as Exs.B.1 to B.17. Ex.B.1

dated 12.7.1972 is the proceedings of Tahsildar, Vedasendur; Exs.B.2 to B.7 are the copies of Thandal in favour of Sakkarai Naidu; Exs.B.8 to B.11 are the copies of thandal in favour of Rangasamy; Ex.B.12 dated 3.2.1974 is the original kist receipt in favour of Rangasamy Naidu; Exs.B.13 to B.15 are the original kist receipts in favour of Perumal; Ex.B.16 dated 29.11.1984 is the original patta executed in favour of Angammal and Ex.B.17 dated 28.11.1984 is the original patta executed in favour of defendants.

7. Besides, the trial Court would mark two Court documents, Exs.C.1 and C.2, Ex.C1 dated 23.8.1984 being the report of the Advocate Commissioner and Ex.C.2 being the sketch. The trial Court would also mark two witness documents, Exs.W.1 and W.2, Ex.W.1 dated 18.6.1906 being the original sale deed executed by Balaguru Naicker in favour of Marammal and Ex.W.2 dated 1.12.1947 being the original sale deed executed by Bharathiammal in favour of Karuppanna Naidu.

8. The Trial Court, having traced the facts and circumstances of the case in the manner required by law and appreciating the above evidence, would ultimately decree the suit with costs, directing the plaintiff to claim the relief of past,future and interim damages by filing separate proceedings under Order XX Rule 12 C.P.C. Aggrieved, defendants 1,2,3, 6 to 9 have preferred the appeal in A.S.No. 101 of 1990 on the file of the Court of District Judge, Dindigul and the said Court, having framed its own points for consideration and having its own discussions, had ultimately dismissed the appeal with costs, thereby confirming the judgment and decree passed by the trial Court and it is only aggrieved against this judgment and decree passed by the first appellate court dated 30.8.1991, defendants 1,2 and 6 to 9 have come forward to prefer the above second appeal on certain grounds as brought forth in the grounds of second appeal. At the time of admission of the second appeal, this Court framed the following substantial question of law:

"Whether the first appellate court was correct in not rendering a finding on the issue relating to adverse possession, even though a ground was raised on this aspect, especially when the trial Court rendered a finding on this aspect?

9. During arguments, learned counsel appearing on behalf of the appellants, besides tracing the facts and circumstances as pleaded by the appellants and respondents as defendants and plaintiffs respectively in the suit and as pleaded in the appeal memo. and in the grounds of appeal before the first appellate court and thereafter as the grounds in the above second appeal and the substantial question of law framed by this Court at the time of admission of the second appeal, would point out that the first appellate court below has neither framed a point regarding adverse possession pleaded on the part of the appellants as the defendants before the trial court, nor discussed the same anywhere so as to determine that aspect which is vital for consideration, particularly in view of the fact that it is an admitted case on the part of the respondents that the appellants are in physical possession and enjoyment of the suit property, and therefore, on that score itself, the learned counsel would seek to allow the appeal, setting aside the judgment and decree passed by the first appellate court. Learned counsel would also point

out that even though the trial court has dealt with the question of adverse possession framing its own issue and determining the same, it has not taken care of those vital aspects which should have been properly handled, and therefore, the trial court cannot also be said to have properly dealt with the subject of adverse possession. On such arguments, the learned counsel would ultimately pray to allow the appeal setting aside the judgments and decrees passed by both the courts below.

10. On the contrary, learned counsel appearing on behalf of the respondents, besides having brought forth few facts and circumstances justifying the decisions of the courts below, would also point out that the contention of 'benami transaction' has not been accepted by both the courts below, more particularly the first appellate court. The learned counsel would also cite a few judgments regarding 'benami transaction' and for framing of the substantial questions of law. So far as the 'benami transaction' is concerned, the learned counsel would cite the following judgments:-

(i) AIR 1974 SC 171 (Jaydayal Poddar v. Bibi Hazra)
(ii) 1989 L.W. 471 (Kistappa Naicker v. Elumalai Naicker)
(iii) AIR 1980 SC 727 (Bhim Singh v. Kan Singh)
(iv) AIR 1971 Madras 370 (Ammaponnammal v. Shanmugam Pillai)

11. So far as the first judgment cited above regarding benami transaction is concerned, it is held therein:-

"It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asseting it to be so. This burden has to be strictly discharge by adducing legal evidence of a definite character which would either directly prove the fact of Benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof.
Though the question, whether a particular sale is Benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformally applicable in all situations, can be laid down, yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale."

Regarding the second judgment cited above is concerned, it is held therein:-

"It has been repeatedly held by this Court that when a husband

purchased the property in the name of his wife by paying his own money, from that alone, no inference can be drawn that the wife was only a benamidar, and having regard to the nature of the relationship between the parties, and the normal tendency of the husband to benefit the wife either by payment of money or by purchase of property in her name, the allegation of benami can be established only by proving the motive for such benami purchase."

So far as the third judgment cited above is concerned, it is held therein:-

"The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus: (1) The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motive governing their action in bringing about the transaction and their subsequent conduct, etc."

Regarding the last judgment cited above is concerned, it is held therein:-

"Hindu Law - Gift to wife - Where the husband purchased the property in the name of the wife with the intention to benefit the wife and to make her the owner of that property, subsequent change of intention of the husband would not divest the wife of the title acquired by her under the sale deed."

Regarding the framing of the substantial question of law, the learned counsel would cite a judgment reported in 2001-1-L.W. 472 (Subba Reddiar v. Vasantha Ammal & another), wherein it is held as follows:-

"It is laid down in AIR 1999 SC 864 that while exercising jurisdiction under Section 100 C.P.C. as it was amended in 1976, the High Court can exercise its jurisdiction only on the basis of substantial questions of law which are to be framed at the time of admission of the Second Appeal and the Second Appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the learned single Judge. It is held by a catena of Judgments by this Court, that the judgment rendered by the High Court under Section 100, C.P. C. without following the aforesaid procedure cannot be sustained. On this short ground alone, this appeal is required to be allowed.
"In view of the categorical pronouncement by the Apex Court, this Court cannot entertain any arguments to be advanced outside the purview of substantial question of law framed at the time of admission of Second Appeal. That apart, both the Courts below have concurrently held against the plaintiff in respect of the above issues based on evidence. The learned counsel for the appellant did not advance any arguments that the Courts below have failed to consider

material evidence on record or ignoring impossible evidence or on any other ground under Section 100, C.P.C. for this Court could interfere. It is well settled principle that this Court cannot interfere in the concurrent findings of facts however erroneous they are. The said principle has been laid down by the Apex Court in the judgment reported in AIR 1999 SC 221 3. In that view of the matter, I do not find any reason even on merits to interfere with the concurrent findings of the Courts below in respect of the above submissions made by the learned counsel for the appellant."

12. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what could be assessed is that that the plaintiffs, who are the respondents herein, have filed a suit for declaration, possession and damages and the defendants, who are the appellants herein, have not only denied the allegations contained in the plaint as false, but have also attributed different reasons in the written statements and the trial court followed all the procedural paraphernalia, giving adequate and equal opportunities for the plaintiffs and the defendants to be heard, during which, on the part of the plaintiffs, they would not only examine three witnesses as P.Ws.1 to 3, but also would mark 22 documents as Exs.A.1 to A.22 and likewise, on the part of the defendants, they would examine the 6th defendant as D.W.1, besides examining one Bomma Naicker as D.W.2 and for documentary evidence, they would examine 17 documents as Exs.D.1 to D.17. Besides these, Exs.C.1, the Court Commissioner's report and C.2, the sketch both dated 23.8.1984 would be marked as Court documents, and two further documents would be marked as witness documents.

13. In consideration of the above, the trial court, having framed five issues and appreciating the evidence, has ultimately arrived at the conclusion to accept the case of the plaintiffs, thus passing a decree as prayed for. The trial court would also frame a third issue for perfection of title by adverse possession as claimed by the defendants and dealing with the same in para. No.8 of its judgment, the Court remarked that the defendants have not placed enough materials in proof of having been in continuous possession and enjoyment of the suit property for over the statutory period and has ultimately passed the decree in favour of the plaintiffs. Aggrieved, the defendants would prefer the appeal before the first appellate court and the Court of District Judge, Dindigul, having framed only one point, without framing any point for the question of adverse possession, but adhering to the judgment of the trial court and having its own discussion on the single point framed to the effect whether the plaintiff is entitled to get the relief as prayed for, would ultimately arrive at the conclusion to dismiss the appeal, thus confirming the judgment and decree as passed by the trial court. It is only aggrieved against this judgment and decree of the lower appellate court and that of the trial court, defendants 1, 2 and 6 to 9l have come forward to file the above second appeal on certain grounds as pleaded in the grounds of appeal for determination of the substantial question of law extracted supra.

14. The substantial question of law is relating to perfection of title by the defendants by means of adverse possession and in spite of having raised this point as one of the grounds for proper consideration, in spite of the trial court having rendered a finding, the first appellate court did not

frame any point for proper consideration of this aspect, had it determined the said point, and therefore, encircling the perfection of title by the defendants by means of adverse possession to the suit property, the substantial question of law has been framed.

15. True, this Court is not able to see any point framed by the first appellate court, nor any discussion held for a valid decision to have been arrived at on this vital aspect of law and fact pleaded by the defendants in the very written statements before the trial court and even though the lower court has dealt with the subject framing an issue, i.e. Issue No.3 and having its own discussion in para. No.8, in order to arrive at a conclusion to reject the defendants' plea on this ground, still, the first appellate court has never bothered about dealing with the aspect of adverse possession pleaded by the defendants and has passed its judgment, confirming the lower court's judgment and decree.

16. At this juncture, it is relevant to point out that the very case of the plaintiffs since being for a declaration and possession, it goes without saying that the physical possession of the suit property is in the hands of the defendants, and therefore, the defendants have rightly pleaded adverse possession and the onus is heavily cast on the plaintiffs to discharge their liability that they are entitled to the possession of the suit property from the defendants and that the defendants are not entitled to it by adverse possession. It is the contention of the trial court that the defendants have failed to prove that they are entitled to the suit property by means of adverse possession with proper evidence for their being in continuous possession and enjoyment of the suit property for over the statutory period, but the first appellate court, whose duty is to appreciate the evidence regarding this aspect in order to decide the same on facts and in law, has not at all dealt with the subject, and therefore, it could very easily be decided that the judgment and decree passed by the first appellate court is bad in law and that the same has to be set aside, thereby remanding the case for reconsideration to the first appellate court for framing proper point for consideration and to decide the same on merits and in accordance with law, particularly answering the question of adverse possession, with further opportunity for the counsel for both sides to advance further arguments on the subject, as it is provided for in the Civil Procedure Code.

In result,

(i) for the foregoing reasons assigned, the above second appeal is allowed in part, setting aside the judgment and decree dated 30.8.199 1 rendered in A.S.No.101 of 1991 by the Court of District Judge, Dindigul;

(ii) the case is remanded to the first appellate court, viz., the Court of District Judge, Dindigul, for being dealt with in the manner aforementioned so as to decide all the points involved, particularly the point of adverse possession as claimed by the appellants herein and deliver the judgment on merits and in accordance with law;

(iii) since it is a long pending matter, it has become incumbent on

the part of this Court to issue yet another direction to the first appellate court to complete the entire process of hearing the appeal within six months and deliver the judgment in the manner provided under law.

(iv) the parties are directed to appear before the Court of District Judge, Dindigul on 16.02.2004.

(iv) however, in the circumstances of the case, there shall be no order as to costs.

Index:Yes
Internet:Yes

gr/gs.

To
1. The District Judge, Dindigul.
2. The Additional District Munsif, Dindigul.